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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1965

No. 903

BRODERICK AND BASCOM ROPE COMPANY,
a Corporation,

Petitioner,

vs.

EUGENE MANGAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

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1. Whether a litigant who objects to certain requests for admissions of facts, but neither objects nor responds to others in the same series, can be permitted to prevent his adversary from reading the said requests upon the erroneous misrepresentation that another Judge had sustained objections to all of said requests.

2. Whether this Court will grant certiorari in a case in which the Court of Appeals, following well established precedents, found many trial errors.

STATEMENT OF THE CASE.

A. Under the guise of a statement of facts, petitioner seeks to argue to this Court that it should consider the testimony before the trial court and weigh the evidence therein and come to the conclusion that despite highly prejudicial reversible errors committed at the trial, this Court should grant a writ of certiorari and ultimately reverse the opinion of the Court of Appeals for the reason that, in petitioner's view, the cable which broke was not its cable. We could show by a review of the record that the cable which broke was petitioner's, but we believe such a request is entirely out of order in an application for a writ of certiorari and does not merit any further consideration. (Supreme Court Rule 19.)

B. Petitioner's summaries of the holdings of the Court of Appeals are not accurately stated and seek to make the opinion of the Court of Appeals say what it does not. The opinion below predicated the reversal upon these basic reasons. Specifically, the court held:

1. Where a party fails to answer, object or otherwise respond to requests for admissions under 28 U.S.C.A. Rule 36 he admits the matters therein stated.

2. Evidence of Workmen's Compensation benefits injected into the case by petitioner's counsel prejudiced respondent's rights.

3. After reversing the judgment, the court noted:

   a) That on the retrial the court should not ask jurors in the minority on a panel to re-examine their appraisal of the evidence in the light of the fact that a majority of their number disagreed, but that an equally specific admonition must be addressed to those jurors being in the majority on the panel.

   b) That the conduct of petitioner's counsel in cross examining a witness upon an exhibit which was never offered in evidence was a misuse of the judicial process.

ARGUMENT.

I.

Petitioner's first reason given for the granting of a writ is that the holding of the Court of Appeals for the Seventh Circuit is in "irreconcilable conflict" with decisions of the Ninth and Fifth Circuits. There is no substance to this contention.

In this litigation the most critical fact question was whether or not petitioner Wire Rope Company had delivered a one-quarter-inch 6 by 7 wire rope or cable to the building project where respondent was injured, instead of the one-quarter-inch 6 by 37 cable that was ordered and supposed to be delivered. In the pursuit of proof on August 23, 1962 respondent filed in the trial court fourteen requests for admission of facts pursuant to 28 U.S.C.A. Rule 36. (A. 10)(*)

The requests which would have established the misdelivery to be a fact were Nos. 1, 4 and 5. (A. 10, 11, 45)

On September 4, 1962 petitioner filed a motion praying that it be relieved from answering respondent's requests *11 through 14,* and that an order be entered extending the time within which it could answer the balance of the requests. (A. 12) Pursuant to a hearing on September 10, 1962, the trial court entered an order sustaining petitioner's objections. (A. 15)

(*) All such references are to Respondent's Appendix in the U.S. Court of Appeals, which has been filed in this Court.

No attempt was made by petitioner to obtain a ruling on that portion of its motion requesting an extension of time to answer the balance of the admissions and *at no time was there a denial or answer of plaintiff's requests numbered 1 through 10.*

In this posture of the case at the immediate outset of the trial and in accordance with the express provisions of Rule 36, respondent sought to read requests Nos. 1 through 10 to the jury. (A. 79) However, at that time petitioner misrepresented to the Court that it had been excused from answering them and that "objection was sustained as to all of them." (A. 79, 80) The Court requested respondent to pass the matter until the record could be checked. (A. 80) During subsequent proceedings, the Court, expressing a desire to see the transcript of the hearing before the judge who entered the order claimed by petitioner to have sustained objections to all requests, put off his ruling as to whether or not the requests could be read to the jury. Then, near the close of plaintiff's case, even though he agreed that requests Nos. 1 through 10 had never been objected to or answered (A. 412), the trial judge inconsistently therewith denied respondent the right to read those admissions into evidence, on an apparent theory that plaintiff had waived the requests for admissions by subsequently filing interrogatories dealing with the same factual matters. (A. 413, 410-411)

Upon this factual background the Court of Appeals, holding this ruling was error, stated (351 F. 2d at 28:)

> "A party's failure to file a verified response to requests for admissions under Rule 36 admits the truth of all matters therein stated, Water Hammer Arrester Corp. v. Tower, 7 Cir., 171 F. 2d 877, 879, Adventures in Good Eating v. Best Places to Eat, 7 Cir., 131 F. 2d 809; O'Campo v. Hardesty, 9 Cir., 262 F. 2d 621, and

unanswered requests are not abandoned by the subsequent filing of interrogatories addressed to the same subject. Woods v. Robb, 5 Cir., 171 F. 2d 539. Where no response is made to requests for admissions, the party making the requests is entitled to rely thereupon and no further proof is required to be made of the facts thus admitted. Water Hammer Arrester Corp. v. Tower, supra.

"That error alone would require reversal of this judgment. Plaintiff advised the court below that his trial preparation was made on the theory that these unanswered requests would stand admitted."

This holding, says the petitioner, is in irreconcilable conflict with *Bowers* v. *E. J. Rose Mfg. Co.*, 9 Cir., 149 F. 2d 612, 614, 615 (1945), and *Woods* v. *Stewart* (erroneously called *Woods* v. *Horton*), 5 Cir., 171 F. 2d 544 (1948). This is an apparent effort to argue an "irreconcilable conflict" between circuits, although other errors entered into the reversal.

The rule is clear, as well as the cases following it. Petitioner does not disagree but refers to different situations. The Ninth Circuit case, *Bowers*, merely demonstrates that a trial court may extend the time for answering requests for admissions under Rule 36 *for good cause shown*. There the requests for admissions were mislaid by someone other than the attorney to whom they were addressed but were answered as soon as they were discovered. In fact, they were answered before the trial judge entered a summary judgment but were ordered stricken from the files of the case. The Court of Appeals held this action to be an abuse of discretion.

In the instant case not only was no answer made, but petitioner never objected to these particular requests although it complained of others in the series. Nor did it

obtain a ruling on an extension of time within which to object or respond.

The Fifth Circuit case, *Woods* v. *Stewart, supra,* claimed to be in conflict with the holding of the Court of Appeals herein, discloses that a *bona fide* mistake was made by the defendant, who, upon the circumstances presented, conscientiously and persistently tried to answer requests for admissions. There defendant denied all of the paragraphs in the request for admissions, but did not do so under oath as required by Rule 36. The court held that because defendant asserted a defense to the suit and that the failure to swear to the answers was due to a misunderstanding, defendant should be allowed to make a proper answer. Certainly that cannot be said of petitioner's conduct in the instant case, remembering that its counsel represented to the trial judge that another judge had sustained objections to all the requests when such was not the fact. (A. 79, 80)

The Court has on many occasions in the past considered cases on certiorari where there was a conflict between decisions of the circuits. When it has granted the writ it has been because of a *square, direct* and *irreconcilable* conflict between the holdings of the various courts of appeals. (See *Mitchell* v. *DeMario Jewelry,* 361 U.S. 288). This is not such a case.

Petitioner seeks now in its petition for certiorari in this Court and in his brief in the Court of Appeals to object to request No. 5 as not being relevant until plaintiff amended his complaint and that this was after the trial had begun. (Pet. 23) Even if it be assumed *arguendo* that there is some merit to this contention (which there is not), it has been heretofore demonstrated that it is fatally defective for the obvious reason that it was never raised at any time in the district court.

The contention by petitioner that its filing of answers to respondent's interrogatories under 28 U.S.C.A. Rule 33 on the same subject matter as respondent's requests for admissions was ground for the district judge to allow petitioner's answer to the interrogatories to stand as an answer to respondent's requests for admissions has no merit and displays a lack of understanding of the purpose of each of the rules.

Rule 33 and Rule 36 each provide separate and distinct methods of discovery, and the use of one is not a waiver of the other. (*Woods* v. *Robb*, 5 Cir., 171 F. 2d 539, 541)

It should also be pointed out that petitioner's contention as to the use to which the rules should be put would require requests and interrogatories to be treated as matters of pleading rather than evidence. As this Court knows, the purpose of discovery procedures is to produce evidence, not to form issues. The unanswered requests for admissions had the same probative value as sworn testimony.

The argument by petitioner at page 23, that there was no compliance with Rule 36 because the time within which the admissions were to be made was not designated by respondent, is invalid. Once again, this argument conveniently ignores the fact that if petitioner had any objection to the manner in which the requests were made or, for that matter, any stage of the proceedings regarding the requests under Rule 36 or the interrogatories under Rule 33, it should have exercised its prerogative to object thereto at the appropriate time. A petition for writ of certiorari in the Supreme Court of the United States is hardly the appropriate time.

Petitioner contends that 28 U.S.C.A. Rule 11 was violated. Petitioner's argument is desperate. It ignores that 28 U.S.C.A. Rule 15 permits an amendment of a pleading whenever it may be necessary in order to make the pleadings conform to the proof that has been adduced.

The desperation of petitioner is further demonstrated by the fact that he states the charges in the complaint were in violation of Rule 11. After evidence was taken at the trial, an amendment was made to conform the pleadings to the proof. A reading of the complaint does not, by any stretch of the imagination, disclose that it was a sham pleading. Moreover, under 28 U.S.C.A. Rule 8(a), all the complaint had to allege was a short statement showing that the pleader was entitled to relief.

II.

Petitioner's contention that in refusing to follow the rule of law announced by the Appellate Court of Illinois in *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 170 N.E. 2d 635 (1960), the Court of Appeals failed to apply the state law within the requirement of 28 U.S.C.A., §1652, and this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, is wholly without merit. First, *Olson's* validity is doubtful in view of certain Illinois Supreme Court decisions, and, second, it did not apply to the trial of this lawsuit.

The record reveals that petitioner's counsel deliberately and repeatedly fatally infected the trial with an aroma of "insurance" and "workmen's compensation."

To point this up, a brief summary of the factual background is necessary. Just before the selection of the jury,

the Court expressed the general view that the question of workmen's compensation could not be injected into the case, but reserved ruling thereon, stating to defense counsel, "I am sure you won't inject it until we can have time to rule on it." (A. 62)

Then during the cross examination of the office manager of the Schweitzer Company, who was called by plaintiff to identify and lay the foundation for documentary evidence in the company's records (A. 111-123), the question arose as to whether the witness could be asked if Schweitzer had paid compensation to plaintiff and stood to recover it if plaintiff was successful in his action against defendant. (A. 153-158) Respondent's objections were sustained (A. 158) and petitioner made an offer of proof which was denied. (A. 189)

This being the state of the record, respondent's witness, Dr. Wozniak, one of the treating physicians, was asked by petitioner's counsel who had paid respondent's doctor bill. The doctor replied that the "insurance company" had done so. (A. 361) Respondent's motion for a mistrial on this ground was denied. (A. 362, 370) The trial court, however, recognized that the question was deliberate and stated to petitioner's counsel, "Now, I am sure that when you asked the question of the doctor, 'Who paid your bill,' you did it deliberately, you did that a few moments ago." (A. 385) The Court further noted that it was a "foul blow" and perhaps involved a question of legal ethics. (A. 389)

Another flagrant instance of petitioner's counsel deliberately flouting the rule of the trial court by cross examining into the area of compensation occurred when respondent called witness Richard Borchardt, who was

the employee of the company retained by Schweitzer to investigate the occurrence. At the conclusion of his cross examination, petitioner's counsel sought to ask him if his "employer has an interest in this lawsuit," (A. 382) but respondent's objection thereto was sustained. (A. 382)

In a recess which followed the trial court censured petitioner's counsel, stating that he was outside the bounds of propriety in asking any questions at all on the subject (A. 385); that he deliberately was attempting to introduce this type of evidence whether it was ruled admissible or not and take his chances on it (A. 386) and that he had disobeyed the Court's request that the propriety of asking questions concerning an interest in the litigation was a matter which would be taken up out of the presence of the jury. (A. 390) Despite the District Court's recognition of this deliberate disobedience and of the fact that the innuendo of workmen's compensation could unduly influence the jury (A. 389), respondent's motion for a mistrial was denied. (A. 387, 393)

It is this general factual background that compelled the Court of Appeals to hold as follows, 351 F. 2d at 29:

> "In this case, the conduct of defendant's counsel in his cross examination of Schweitzer's office manager, the doctor and Borchardt in defiance of the court's admonition was an act not to be condoned. The motive for such questioning could not have been entirely an attempt to show possible bias of the witnesses. The doctor was not a Schweitzer employee. He could have no possible interest in the case. Borchardt was not a Schweitzer employee as we shall presently show. Thus, even if the judge was correct in his ultimate ruling that evidence of the receipt of workmen's compensation might be adduced to show the possible bias of witnesses, we are still faced here

with gross error. Counsel's willingness to inject that evidence into the case at any cost is sufficient to earn him a new trial for plaintiff."

The injection of workmen's compensation or insurance has been held generally by this Court, the Illinois Supreme Court, the U. S. Court of Appeals for the Seventh Circuit and other Circuits, to be of such a nature that it is highly prejudicial to a plaintiff's case.[1]

There is more.

At the end of the trial, and over respondent's objections, the trial court, apparently on the basis of *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 170 N.E. 2d 635 (1960), held that Borchardt should be cross examined concerning workmen's compensation for the purpose of showing his possible bias. (A. 424, 425)

Over respondent's objections, petitioner was permitted to ask Borchardt if a lien had been filed against petitioner on behalf of Schweitzer and if the lien represented amounts paid to Dr. Wozniak, to a hospital, and amounts of weekly benefits paid to respondent under the Illinois Workmen's Compensation Act. (A. 429, 430) Also, the Court permitted the witness to be asked who was handling the defense "in the suit of *Eugene Mangan* v. *William Schweitzer*, 723798, in the Industrial Commission,"

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[1] *Eichel* v. *New York C. R. Co.*, 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed. 2d 307; *Tipton* v. *Socony Mobile Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed. 2d 4; *Goldman* v. *Checker Cab Co.*, 7 Cir., 325 F. 2d 853, 856; *Bryntesen* v. *Carroll Const. Co.*, 22 Ill. 2d 63, 174 N.E. 2d 172; *O'Brien* v. *Chicago City Ry. Co.*, 305 Ill. 244, 262, 137 N.E. 214, 27 A.L.R. 479; *Burnett* v. *Hernandez*, 9 Cir., 263 F. 2d 212. *Cf.*, *King* v. *Grimm*, 7 Cir., 300 F. 2d 658, 660.

(A. 432) and if Martin Boyer Company, Borchardt's employer, had entered its appearance "as defending William E. Schweitzer & Company in that case." (A. 433)

As far as this cross examination of Borchardt, admitted by the District Judge upon the authority of *Olson*, the Court of Appeals properly held that such examination was error irrespective of *Olson*. (See *Mangan* v. *Broderick and Basconi Wire Rope Co.*, 351 F. 2d at p. 30)

This Court itself in *Tipton* v. *Socony Mobile Oil Co.*, 375 U.S. 34, and *Eichel* v. *New York Central R. Co.*, 375 U.S. 253, specifically recognized that evidence of collateral benefits is subject to misuse by a jury, and that such evidence involves a substantial likelihood of impact. Multiple decisions throughout the country have also stated this principle.[2]

III.

No compelling ground has been advanced and none exists for granting of the writ of certiorari on the basis of the disposition by the Court of Appeals of the use of

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[2] *Smith* v. *Majestic Iron Works*, 2 N.Y. 2d 544; *Posnick* v. *Crystal*, 168 N.Y.S. 868; *Zimber* v. *Kress*, 232 N.Y.S. 46; *Book* v. *Henderson*, 176 Ky. 785; *Regan* v. *Frontier E. & M. Co.*, 208 N.Y.S. 46; *Lengle* v. *North Lebanon Twp.*, 274 Pa. 51; *Blatt* v. *Davis Const. Co.*, 184 P. Super. 30; *Stratton* v. *Sioux Falls*, 49 S.D. 113; *Myers* v. *Thomas*, 143 Tex. 502; *Pattison* v. *Highway Comm.*, (Tex. Civ. App.) 278 S.W. 2d 207; *Dallas Ry. Terminal Co.* v. *Hendrix*, (Tex.) 261 S.W. 2d 610; *Davison* v. *Eby Const. Co.*, 169 Kan. 256; *Altenbaumer* v. *Lion Oil Co.*, C.A. 5, 186 F. 2d 35.

the *Allen* charge in the case at bar. (*Allen* v. *U. S.* (1896), 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528.) As to this, the Court held, 351 F. 2d at 30:

> "Though it is not likely to recur on a new trial of this case, we think one other aspect of this appeal should be briefly mentioned. After the jury had deliberated for some six hours, the jurors were permitted to separate and to go to their homes for the night. Shortly after they met on the following morning, the court gave the jury an additional charge which tended, among other things, to tell each of the jurors being in the minority on the panel to reexamine his appraisal of the evidence in the light of the fact that a majority of their number, who were equally intelligent people, disagreed. We think it error to so charge a jury unless a like admonition, equally specific, is likewise addressed to those jurors holding a majority view of the evidence."

On March 2, 1964, the case went to the jury, the jurors deliberating from approximately 3:45 P.M. to 9:45 P.M., except for time spent at dinner, after which they were permitted to separate and go to their homes. (A. 659) On March 3, they convened again at 10:00 A.M. (A. 659) Shortly thereafter, *over the objection of both parties*, the Court summoned the jury, inquired if they were in disagreement, and upon receiving an affirmative reply, then gave a lengthy instruction or admonition which, in effect, paradoxically told them to hurry up but to take their time, and suggested that those in the minority should give way to the majority, and that the evidence of the case was such that a verdict should be reached. (A. 660-663) In midafternoon of March 3, 1964, the jury returned its verdict for defendant. (A. 41) This was not the basis for reversal, but was an admonition to the court not to repeat it. Such is in accord with this Court's

decision in *Jenkins* v. *United States*, 380 U.S. 445, 446, and such decisions as *United States* v. *Rogers*, 289 F. 2d 433, 435 and *Green* v. *United States*, 309 F. 2d 852.

IV.

The Court of Appeals also found that petitioner's counsel had also committed a deliberate misuse of the judicial process when he cross examined a witness upon a damaging exhibit not in evidence and which could not be received in evidence. That holding is not contested by petitioner now since it was literally manufactured by petitioner during the trial. On this the district judge said he was "amazed" at counsel. (A. 598) It is another of the many "foul blows" dealt by petitioner's counsel and discloses the necessity of affording respondent a new trial unexposed to such practices.

CONCLUSION.

No valid reasons have been advanced by petitioner for this Court to grant certiorari in the face of an error-packed record. Petitioner's attempt to manufacture a conflict between the circuits as to the construction of Rule 36 is futile. The Court of Appeals was correct in granting respondent a new trial without onuses unknown to the judicial process. The petition for certiorari ought to be denied.

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